

EXHIBIT 61

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF TEXAS
3 MARSHALL DIVISION

4 FUNCTION MEDIA, LLC,) (
5) (CIVIL DOCKET NO.
6) (2:07-CV-279-CE
7 VS.) (MARSHALL, TEXAS
8) (
9 GOOGLE, INC, ET AL) (AUGUST 19, 2010
10) (9:00 A.M.

11 MOTIONS HEARING
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM
13 UNITED STATES MAGISTRATE JUDGE

14
15 APPEARANCES:

16
17 FOR THE PLAINTIFF: (See attached sign-in sheet.)

18 FOR THE DEFENDANTS: (See attached sign-in sheet.)
19

20 COURT REPORTER: MS. SHELLY HOLMES, CSR
21 Deputy Official Court Reporter
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25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

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1 LAW CLERK: All rise.

2 THE COURT: Please be seated.

3 All right. We've got a hearing on some
4 post-trial motions in Case 2:07-CV-279, Function Media
5 against Google.

6 What says the plaintiff?

7 MR. TRIBBLE: Your Honor, Max Tribble. I'm
8 here with Joe Grinstein, Justin Nelson, Stacy Schultz,
9 Warren Burns, Calvin Capshaw, and Chris Bunt. Plaintiff
10 is ready to proceed, Your Honor.

11 THE COURT: All right. For Google?

12 MR. DEFRANCO: Good morning, Your Honor.
13 Ed DeFranco for Defendant Google. I'm here with Patrick
14 Curran and Amy Candido. Also with me is Melissa Smith,
15 Your Honor, and John Labar from Google.

16 THE COURT: All right.

17 MR. DEFRANCO: Mr. Verhoeven sends his
18 apologies, Your Honor. He had a long-planned family
19 vacation in between trials, or otherwise he would be
20 here.

21 THE COURT: All right. Well, you can do his
22 time for him and --

23 MR. DEFRANCO: That's why I'm here, Your
24 Honor.

25 THE COURT: I'm being facetious. Well, good

1 There's been extensive briefing on the issue
2 of spoliation, and I feel honestly like I have given the
3 same explanation over and over, and it's going somewhat
4 into a black hole. So I want to really take a moment to
5 focus on the actual facts in this case. And to that
6 end, I'm going to put up the supplemental declaration of
7 Theresa Beaumont from Google.

8 Theresa Beaumont is a discovery counsel at
9 Google with primary responsibility for dealing with the
10 production of electronic information from Google in --
11 across all sorts of different litigations.

12 And in Paragraph 2, you can see there that
13 she says, "As I stated in my January 15, 2010,
14 declaration, in September 2008, Google decided, based on
15 accepted widespread and reasonable industry standards
16 and consistent with the nature of these communications,
17 that it would no longer record instant messages as a
18 standard business practice."

19 That change in the default setting only
20 concerned instant messages taking place after September
21 2008. The change in the default setting did not result
22 in the destruction of any previously saved instant
23 message chat records. No, none, no destruction of chat
24 records.

25 In particular, all instant messages recorded

1 So it's not the case where we just sort of
2 switched everybody to off the record and said, "You
3 know, oh, well, that's our new policy." Those people
4 were told to preserve instant messages that were
5 relevant by putting them on the record.

6 It's in the record that Theresa Beaumont's
7 first declaration makes it clear, Google can't change --
8 the setting has to be the same -- the default setting
9 across the entire, like, 30,000 Google employees. So
10 it's not an instance where we could have just said,
11 "Okay, let's put Sergey Brin or Susan Wojcicki or
12 whomever's IMs on -- on the record default and everybody
13 else is on off the record." Everybody's had to either
14 be on or off.

15 You know, and for larger data management
16 and policy reasons, Google made the decision to switch
17 to off the record -- and because they couldn't put those
18 people individually on -- on the record, they told them
19 for pertinent communications related to this litigation
20 hold, you need to put them on the record.

21 Now, those witnesses --

22 THE COURT: How was that communicated?

23 MS. CANDIDO: Excuse me?

24 THE COURT: How was that communicated to
25 these employees?

1 MS. CANDIDO: I believe that that was
2 communicated to those employees -- at least in the first
3 instance, with the policy change, as part of the
4 announcement of the policy change. And then I think
5 also in connection with document -- so the
6 communications they have with individuals at the
7 beginning of a lawsuit about collecting documents and
8 things like that, I believe those were orally -- well, I
9 don't want to reveal privilege, but I -- I think they
10 were additional reinforcements about policy --

11 THE COURT: But you swore out an affidavit
12 that said that.

13 MS. CANDIDO: Yes, there -- there's a sworn
14 affidavit right here that they were told that.

15 THE COURT: I just was interested in how
16 that was communicated.

17 MS. CANDIDO: Well, I know that it was
18 communicated in connection with the policy change when
19 it took place.

20 You know, I just want to refer, too, to that
21 Malletier case where the Court specifically says that
22 a -- the claim that a defendant was required to log
23 every chat was, quote, akin to a demand that a party to
24 litigation install a system to monitor and record phone
25 calls coming into its office on the hypothesis that some

1 of them may contain relevant information.

2 There's no such requirement. And really
3 it's just the same hypothesis that -- that Mr. Nelson is
4 putting forth here that there might -- there just --
5 there might be these chats or by putting chats off the
6 record, it enables people to have secret chats about
7 things that aren't -- well, I mean, you can have a
8 hallway conversation, you can have a phone call
9 conversation. It's no different than that.

10 And to the extent they want discovery with
11 respect to those things, that's what depositions are
12 for. At depositions, they were free to ask all these
13 witnesses, "What did you communicate with people in the
14 hallway about X subject or did you have telephone
15 communications about Y subject? Did you have instant
16 message communications? What did you say? When did you
17 have them?" I mean, they can ask all the same questions
18 they could ask about phone calls or hallway
19 communications with respect to -- to IM messages.

20 And I think it's important to -- to note
21 that despite the existence of two snippets of IMs that
22 were pasted into e-mails that are non -- that are in
23 some ways substantive, Mr. Brin, Ms. Wojcicki -- they've
24 all testified that they use IMs very different than what
25 plaintiff is hypothesizing.